Luther News, June 2012

Luxembourg

Greetings:

It has been another busy and exciting quarter for Luther Luxembourg. In addition to serving our clients and following market and industry developments, which you will see below, we have taken a significant step forward in evolving as a firm.

As a result of our growing needs we recently moved. As of June 18, 2012 you can find us at Luther, Aerogolf Center, 1B, Heienhaff, L-1736 Senningerberg, Luxembourg. We invite you visit our new home and share your feedback.

Below, please find current and relevant tax, legal and regulatory updates at a high level. We hope that you will find the information beneficial and will contact us should you need additional information.

Eric Sublon
Managing Partner
Luther Luxembourg

Content

New Germany-Luxembourg Tax Treaty

On April 23, 2012, Germany and Luxembourg signed a new Double Tax Treaty ("DTT"). The aim of the new DTT is to replace the one signed in 1958, and follow the structure and, for the most part, the content of the OECD Model Tax Convention. The main provisions of the new DTT, will particularly bring along important changes regarding real estate investments through German investment vehicles and hybrid funding into Germany.

The new DTT is welcomed, as it will ensure that Germany and Luxembourg will now have a DTT which generally follows the OECD Model Tax Convention. This is good news as it generally simplifies questions of treaty interpretation and provides, in most cases, more legal certainty to tax payers. Positive developments introduced by the new DTT are the new maximum WHT rate on dividends and the granting of DTT benefits (which becomes much clearer now) to CIVs. The new DTT, however, will have an impact for German real estate investment structures, investments in German financial instruments and taxation of capital gains derived on participations in capital companies by individuals moving their residency from one state to the other.

We encourage you to check with your advisor on the impact the DTT might have on your and your clients' organizations.

Eric Sublon. Managing Partner
Luther, Luxembourg
eric.sublon@luther-lawfirm.com
Phone +352 27484 678

Banking, Finance and Capital Markets Update

A number of developments have recently taken place in the Banking, Finance and Capital Markets field. Below please find a high-level overview of three interesting changes. To receive any additional information and details, please contact Laurent Massinon (laurent.massinon@luther-lawfirm.com or +352 27 48 46 58).

Amendment to the law on the insurance sector

The Parliament is currently examining a bill (the "**Bill**") amending the law dated 6 December 1991 on the insurance sector (the "**Insurance Law**").
The four objectives of the Bill can be summarised as follows:

1- to bring together in the same part of the Insurance Law the existing provisions relating to the various professionals of the insurance sector (professionels du secteur de l'assurance, the "**PSAs**");

2- to create and organize new professions within the insurance sector which will be subject to (i) the prudential supervision of the Commissariat aux Assurances (the "**CAA**") and (ii) the obligations of confidentiality of Article 111-1 of the Insurance Law;

3- to facilitate the use of outsourcing services by (re)insurance companies; and

4- to adjust and complete the provisions applicable to (re)insurance intermediaries.

The new provisions will be inserted in Part V of the Insurance Law, which is currently devoted to insurance managers and insurance intermediaries. It

results from the Bill that Part V of the Insurance Law will be entirely recasted. This new section of the Insurance Law makes certain professionals subject to licensing, and introduces increased financial, reporting and supervision requirements in order to avoid the emergence of fragile structures in the insurance sector which could have a negative impact on the reputation and robustness of the entire Luxembourg financial place. This new section of the Insurance Law covers the newly regulated category of insurance sector professionals which are the PSAs. PSAs encompass management companies of captive insurance companies, insurance companies in run-off, reinsurance companies, pension funds or insurance portfolios and certain services providers of the insurance sector.

It should be noted that the list of PSAs included in the current draft Bill responds to some current needs of the insurance sector, but the creation of certain providers of services linked to corporate governance anticipates the implementation of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance ("Solvency II"). It is quite likely that the implementation of Solvency II should also lead to the creation of new categories of PSAs. Given the current discussions on Solvency II, the legislator took the view that, in terms of anticipation, it was still too early to go further.

Please note that the Bill extends the scope of the amended law dated 12 November 2004 relating to the fight against money laundering and terrorism financing to the PSAs in order to submit them to the requirements of such a law.

Questions /answers on statuses of professional of the financial sector updated by the Commission de Surveillance du Secteur Financier

The Commission de Surveillance du Secteur Financier (the "**CSSF**") updated questions 51 to 54 in the document « Questions/Answers on the statuses of PFS – Part II ». The main change concerns the answer given to question 51 on the performance of the activity of professionals performing lending activities and more specifically the interpretation given by the CSSF to the notion of "Public" used in Articles 28-4 (1) of the law dated 5 April 1993 on the financial sector, as amended (the "**Banking Law**").
The former position of the CSSF can be, along the lines, briefly summarised as follows, granting of loans only to certain professional clients within the meaning of the MiFID or to a restricted group of persons clearly identifiable in advance because they met some criteria did not constitute granting of loans "to the public", as long as the lending entity did not solicit the public. The question whether loans are granted "to the public" or not will have to be assessed on a case-by-case as it does not seem to be possible to rely on a general position. For instance, the CSSF was recently confronted to acquisitions of undrawn credit facilities or loans immediately transferred after signing with a credit institution as not falling under the scope of the Banking Law. Without reconsidering the legal validity of such transactions, the CSSF takes the view that it is now advisable to clear in advance similar transactions.

Lastly, the CSSF clarified in its revised Q&A 53 that factoring transactions falling under the factoring license requirements in the Banking Law need to include a "lending component". For instance, if a

professional acquiring claims does not pay anything to the transferor of the claims before it has itself recovered the sums due under such claims, in such case, in the absence of any "lending component" no factoring license requirements would be triggered for the acquirer of the claims.

CSSF annual report for 2011

The annual report for 2011, which was recently released by the CSSF covers a wide range of topics which cannot be covered in this Newsletter. However, in order to make a link with our first Newsletter published in last April 2012 and in particular with our considerations made on prospectus matter, we will briefly mention the recent developments made by the CSSF on this matter.

Prospectus law:

Supplement to a prospectus in case of change of rating

The CSSF took the view that a change made to the rating of an issuer or its securities should be qualified as a significant and material change having a direct impact on the valuation of the securities. Based on the above, this change will therefore imply the preparation of a supplement in compliance with article 13 of the law dated 10 July 2005 on prospectuses for securities (the "**Prospectus Law**"). This general position may not be appropriate only in specific, justified and motivated cases.

Incorporation by reference of a registration document in a prospectus

The CSSF decided to review its position regarding the incorporation by reference of a registration document in a prospectus. Previously, the CSSF had refused the incorporation by reference of registration documents approved by the CSSF into complete prospectuses despite the fact that it was however allowed for documents approved by another regulator. The CSSF now authorizes such incorporation by reference in order to ensure equal treatment of all issuers.

Laurent Massinon, Counsel
Luther, Luxembourg
laurent.massinon@luther-lawfirm.com
Phone +352 27484 658

Amendments to the Luxembourg SIF Law – Overview of the relevant provisions and practical impacts

The law amending the Luxembourg law of 13 February 2007 on specialised investment funds ("SIF Law") has been enacted on 26 March 2012 and is in force since 1 April 2012.

The most salient features of the SIF Law can be summarised as follows:

- it takes into account certain aspects of the Alternative Investment Fund Managers Directive ("AIFMD");
- SIFs may only start their operations upon the prior approval by the CSSF (the powers of which will also be increased);

- by 30 June 2012, SIFs will have to implement
  (i) measures to ensure that the securities they issue are held by well-informed investors;
  (ii) appropriate risk management systems in order to detect, measure, manage and monitor the risk associated and the contribution thereof to the general risk profile of their portfolios; and
  (iii) conflicts of interest provisions;

- by 30 June 2013, the delegation of specific tasks and functions to third parties is, inter alia, subject to
  (i) the disclosure in the issuing document;
  (ii) that the delegate has the necessary honorability and experience; and
  (iii) the fact that the delegation of investment management functions, if applicable, can in principle only be given to individuals or legal persons being subject to prudential supervision; the CSSF may however grant exemptions;

- the translation of the English worded articles of incorporation into either French or German is no longer required; the same applies to any other notarial act (such as the extraordinary general meeting of shareholders minutes ("EGM") or the merger project regarding a SICAV);

- the SIFs organised as a commercial company do no longer need to send the
  (i) annual report;
  (ii) management report; and
  (iii) auditor report

  at the same time to the shareholder as the convening notice to general meetings of shareholders (the convening notice will have to indicate the place and practical arrangements for providing these documents to the shareholders and the shareholder may request that they are sent to him); the convening notice can further indicate that the quorum will be fixed according to the number of issued shares on the 5th day prior to the general meeting, i.e. the record date. The respective shareholder's voting and participation rights will be fixed according to the shares held at the record date;

- any contribution in kind to a SIF (including a FCP) is subject to a report issued by an external and independent auditor (réviseur d'entreprises agréé); and

- it introduces rules governing cross sub-fund investments, subject to the following conditions:
  (i) the target sub-fund may not make circle investments in the investee sub-fund;
  (ii) the voting right(s), if any, attached to these shares will be suspended for the time being held by that sub-fund; and

(iii) during this period, the value of these shares will not be considered for the NAV calculation regarding the verification of the minimum threshold of the net assets.

The difference to UCITS is that:

(i) management, subscription and repurchase fees may be charged; and

(ii) the target sub-fund may invest its monies in sub-funds of the same SIF (except for the investee sub-fund).

Max Welbes, Partner
Luther, Luxembourg
max.welbes@luther-lawfirm.com
Phone +352 27 484 674

Marie-Astrid Willems, Associate
Luther, Luxembourg
marie-astrid.willems@luther-lawfirm.com
Phone +352 27 484 663

SPF´s The Luxembourg Vehicle of Choice for Private Wealth Investment

Designed by the law, dated 11 May 2007 (the "**SPF Law**"), for the management of the investments of private individuals, and in order to replace the Holding regime of 1929, the Luxembourg private wealth management companies (*sociétés de gestion de patrimoine familial* "**SPFs**") have become particularly attractive since the amendment of the regime, by the law dated 18 February 2012.Thus it might be useful to recap some of the rules governing the SPFs.

SPFs are vehicles, dedicated to **private investors** and therefore only private individuals or entities acting in the exclusive interest of the private wealth of such private individuals are eligible investors.

SPF's allow individual investors the possibility to choose the most appropriate and suitable vehicle for their investment, and benefit from a high level of **flexibility**. Indeed, SPF companies may be set up as private limited liability company (société à responsabilité limitée), public company limited by shares (société anonyme), corporate partnership limited by shares (société en commandite par actions) or cooperative company organized as public company limited by shares (société cooperative organisée sous forme de société anonyme).

The corporate scope of SPF's is limited to the acquisition, holding, management and disposal of any kind of financial assets; SPF's are not allowed to carry any commercial activity nor to take an active part in the managing of their subsidiaries.

SPFs are submitted to a **favorable tax regime** consisting of (i) an annual subscription tax rate of 0.25% (with a minimum of EUR 100.- and a maximum of EUR 125,00.-) applicable on the total amount of the paid up share capital, plus share premium, plus part of debt exceeding eight times the total amount the paid up share capital, plus share premium, and (ii) the exemption of corporate income tax, municipal business tax and net wealth tax.

Originally, the exemption referred above wasn't applied, if more than 5% of the dividends received during a year came from participations in non-resident and non-listed companies, which were not subject to tax considered similar to the Luxembourg corporate income tax.

The recent amendment of the SPF regime is addressing this particular tax aspect. Indeed, as a result of a letter from the European Commission dated 2010, drawing the attention of the Luxem-

bourg authorities to a possible incompatibility of the provisions of the SPF Law with the Treaty on the Functioning of the European Union and the Agreement on the European Economic Area, the law dated 18 February 2012 (with effect as of 1st January 2012) removed the 5% dividend limitation.

As a consequence, SPFs are now allowed to extend their investment portfolio and receive, without limitation dividends from entities located in any jurisdiction. Therefore, the location of investments is no longer an obstacle for the existing SPFs and investors, who wish to diversify their investments.

Aurelien Latouche, Senior Associate
Luther, Luxembourg
aurelien.latouche@luther-lawfirm.com
Phone +352 27484 680

Your contacts in Luxembourg

Eric Sublon
Avocat à la Cour, Partner
eric.sublon@luther-lawfirm.com
Phone +352 27484 678

Maître Max Welbes, LL.M.
Avocat à la Cour, Partner
max.welbes@luther-lawfirm.com
Phone +352 27484 674

Maître Aurélien Latouche
Avocat à la Cour
mathieu.laurent@luther-lawfirm.com
Phone +352 27484 680

Maître Laurent Massinon
Avocat à la Cour
laurent.massinon@luther-lawfirm.com
Phone +352 27484 658

Marie-Astrid Willems
Lawyer
marie-astrid.willems@luther-lawfirm.com
Phone +352 27484 663

Luther
Aerogolf Center
1B, Heienhaff
L-1736 Senningerberg, Luxembourg
Phone +352 27484-1
Fax +352 27484 69
luxembourg@luther-lawfirm.com

Imprint
Luther Rechtsanwaltsgesellschaft mbH, Anna-Schneider-Steig 22, 50678 Cologne, Phone +49 221 9937 0, Fax +49 221 9937 110, contact@luther-lawfirm.com
V.i.S.d.P.: Eric Sublon, Luther, Aerogolf Center, 1B, Heienhaff, L-1736 Senningerberg, Phone +352 27484 1, Fax +352 27484 690, eric.sublon@luther-lawfirm.com

---

Luther

Avocats à la Cour

Our offices in Germany

Berlin
Luther Rechtsanwaltsgesellschaft mbH
Friedrichstrasse 140
10117 Berlin
Phone +49 30 52133 0
berlin@luther-lawfirm.com

Cologne
Luther Rechtsanwaltsgesellschaft mbH
Anna-Schneider-Steig 22
50678 Cologne
Phone +49 221 9937 0
cologne@luther-lawfirm.com

Dresden
Luther Rechtsanwaltsgesellschaft mbH
Radeberger Strasse 1
01099 Dresden
Phone +49 351 2096 0
dresden@luther-lawfirm.com

Dusseldorf
Luther Rechtsanwaltsgesellschaft mbH
Graf-Adolf-Platz 15
40213 Dusseldorf
Phone +49 211 5660 0
dusseldorf@luther-lawfirm.com

Essen
Luther Rechtsanwaltsgesellschaft mbH
Gildehofstrasse 1
45127 Essen
Phone +49 201 9220 0
essen@luther-lawfirm.com

Frankfurt a. M.
Luther Rechtsanwaltsgesellschaft mbH
An der Welle 10
60322 Frankfurt a. M.
Phone +49 69 27229 0
frankfurt@luther-lawfirm.com

Hamburg
Luther Rechtsanwaltsgesellschaft mbH
Gaensemarkt 45
20354 Hamburg
Phone +49 40 18067 0
hamburg@luther-lawfirm.com

Hanover
Luther Rechtsanwaltsgesellschaft mbH
Berliner Allee 26
30175 Hanover
Phone +49 511 5458 0
hanover@luther-lawfirm.com

Leipzig
Luther Rechtsanwaltsgesellschaft mbH
Grimmaische Strasse 25
04109 Leipzig
Phone +49 341 5299 0
leipzig@luther-lawfirm.com

Munich
Luther Rechtsanwaltsgesellschaft mbH
Karlstrasse 10-12
80333 Munich
Phone +49 89 23714 0
munich@luther-lawfirm.com

Stuttgart
Luther Rechtsanwaltsgesellschaft mbH
Augustenstrasse 7
70178 Stuttgart
Phone +49 711 9338 0
stuttgart@luther-lawfirm.com

Your local contacts can be found on our website
www.luther-lawfirm.com

Our international offices

Brussels
Luther Rechtsanwaltsgesellschaft mbH
Avenue Louise 240
1050 Brussels
Phone +32 2 6277 760
brussels@luther-lawfirm.com

Budapest
Luther in cooperation with:
Walde, Fest & Partners
Attorneys at Law
Kossuth Lajos tér 13 – 15
1055 Budapest
Phone +36 1 381 000
office@waldefest.hu

Istanbul
Istanbul@luther-lawfirm.com

London
Luther
7 Pilgrim Street
London EC4V 6LB
london@luther-lawfirm.com

Luxembourg
Luther
Aerogolf Center
1B, Heienhaff
1736 Senningerberg
Phone +352 27484-1
luxembourg@luther-lawfirm.com

Shanghai
Luther Attorneys
21/F ONE LUJIAZUI
68 Yincheng Middle Road
Pudong New Area, Shanghai
Shanghai 200121
Phone +86 21 5010 6580
shanghai@cn.luther-lawfirm.com

Singapore
Luther LLP
4 Battery Road
#25-01 Bank of China Building
Singapur 049908
Phone +65 6408 8000
singapore@luther-lawfirm.com

Luther Rechtsanwaltsgesellschaft mbH advises in all areas of business law. Our clients include medium-sized companies and large corporations, as well as the public sector. Luther is the German member of Taxand, a worldwide oganisation of independent tax advisory firms.

Berlin, Cologne, Dresden, Dusseldorf, Essen, Frankfurt a. M., Hamburg, Hanover, Leipzig, Munich, Stuttgart | Brussels, Budapest, Istanbul, London, Luxembourg, Shanghai, Singapore